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No. 71-281

# In the Supreme Court of the United States

OCTOBER TERM, 1971

CAROL BLACK, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. This action was brought by petitioners against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for the wrongful deaths of Dr. Thomas Black and his wife, Jane Black, who died in a plane crash. The United States filed a third party complaint against the estate of the pilot.

Allen Black, the pilot, was flying a Cessna 182 from Baton Rouge, Louisiana to Fort Worth, Texas accompanied by his parents, Dr. and Mrs. Black. Although he had not been warned by the Federal Aviation Administration ("F.A.A.") operator in Louisiana that a line of thunderstorms had formed in Texas and Oklahoma, the storm clouds became clearly visible

during the flight. The pilot flew into the clouds in spite of the fact that he was required to fly VFR (Visual Flight Rules) and was thus forbidden to enter clouds or any other weather obscuring vision (14 C.F.R. 91.105). Approximately 100 miles after entering the clouds, the plane crashed (Pet. App. A. 23–25).

The district court found that both the failure of the F.A.A. operator to warn the pilot of the thunderstorms and the negligence of the pilot in flying into the path of a storm which was plainly visible were the proximate causes of the crash. Accordingly, petitioners were awarded judgments against the United States aggregating $250,000 (Pet. App. A. 30–31); the United States in turn was granted judgment on its third party complaint against the pilot's estate (*id.* at 31).

On appeal, the court of appeals noted that the F.A.A. operator's failure to give the pilot adequate weather information occurred two hours before the plane reached the storm and that "the pilot's 'penetration into the clouds, knowing that he could not navigate visually within them, was as imprudent an act as diving into mid ocean not knowing how to swim' " (Pet. App. B. 39). Accordingly, the court held that "[t]he failure of the operator to warn the pilot of the presence of the storm in his path cannot be regarded as a continuing proximate cause after the pilot himself discovered its presence, appreciated the danger, and decided to fly ahead into it. To rule out an appreciation of danger disregards the pilot's weather training and 600 hours of flying experience" (Pet. App.

B39–40). Overturning as clearly erroneous the district court's finding that the government's negligence was a proximate cause of the accident, the court below reversed the judgment of the district court.

2. The decision below exonerating the government from liability was based on a careful analysis of the facts and presents no issue warranting review by this Court. Contrary to petitioners' assertions, the court of appeals properly applied the clearly erroneous standards embodied in F.R. Civ. P. 52(a) and recognized the applicability of Lousiana law (Pet. App. B. 35–37).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

SEPTEMBER 1971.

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